

A Mohamad Nazri bin Ali v Abdullah bin Sidek

HIGH COURT (TEMERLOH) — CIVIL APPEAL NO 11-80 OF 1999
 MOHD HISHAMUDIN J
 8 FEBRUARY 2000

B *Civil Procedure* — *Judgments and orders* — *Setting aside* — *Judgment in default of defence* — *No irregularity, abuse of process of court or injustice in judgment* — *Whether appellant should have appealed to High Court instead of applying to set aside judgment* — *Whether magistrate had power to set aside judgment* — *Subordinate Court Rules 1980 O 2 r 2, O 29 r 14 & O 53 r 11*

C On 21 December 1998, the respondent ('the plaintiff') filed at the Magistrate's Court, Temerloh, a summons against the appellant ('the defendant'). On 9 April 1999, when the case was called, the defendant disputed the claim and was ordered to file and serve his statement of defence before the next mention date of 23 April 1999 and was advised by the court to engage a counsel. On 13 April 1999, the defendant engaged Tetuan Bong & Co and filed in his notice of appearance on 15 April 1999. On 23 April 1999, as no statement of defence was filed or served, counsel for the plaintiff applied orally for judgment in default of defence. The magistrate gave judgment as prayed for by the plaintiff and refused to grant more time to the defendant. On 17 May 1999, the defendant filed an application to set aside the order of 23 April 1999. On the date of the hearing on 30 July 1999, counsel for the plaintiff made a preliminary objection that the correct procedure to be taken by the defendant was to have been by way of an appeal to the High Court and not by an application to set aside. The magistrate upheld the preliminary objection, holding that he had no power to set aside his previous order and dismissed the application with costs. Hence, this appeal to the judge-in-chambers.

G **Held**, dismissing the appeal with costs:

- (1) By reason of O 29 r 14 of the Subordinate Court Rules 1980 ('the SCR'), the learned magistrate was right in law in ruling that he did not have the power to set aside his own judgment given in default of defence, and that the appellant should have appealed to the High Court instead of applying to set aside his judgment. The opening words of O 29 r 14 SCR implies that if in respect of a judgment or order made by a subordinate court in respect of a civil matter, there is no provision in the SCR for the setting aside of that order or judgment, as in the present case, then there is no recourse to setting aside the same; the appropriate procedure to be followed by an aggrieved party in such a situation is to appeal to the High Court against that decision (see pp 358I-359A, 362I-363A).

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- (2) The magistrate does not have power to set aside by virtue of O 2 r 2 SCR as the defendant was not alleging any irregularity in the proceeding and the application was solely on the merits (see p 360E). Similarly, the magistrate does not have the power to set aside by virtue of O 1 r 4(1) SCR read with O 19 r 9 of the Rules of the High Court 1980 as there is no lacuna in the SCR for, in respect of a decision made under O 14 r 5(3) SCR, there is still the avenue to set the decision aside by appealing to the High Court pursuant to O 49 r 6 SCR (see pp 360H–361H). A
- (3) Furthermore, by virtue of s 99A Subordinate Courts Act 1948 and s 19 of the Third Schedule of the Act, the power to discharge any judgments or orders may be exercised only ‘to the extent and in the manner provided by rules of court’. As the SCR have prescribed the situations or circumstances where the power of the court to set aside may be exercised and in the light of the implication of O 29 r 14 SCR, it follows that the power to set aside may only be exercised by the court in the situations or circumstances so specified, and not otherwise (see p 362C–H). Also, the magistrate does not have the power to set aside by virtue of O 53 r 11 SCR as before the magistrate, the defendant was not alleging any abuse of the process of the court on the part of any party and there was no question of preventing any injustice because the defendant had a right to appeal to the High Court (see pp 362E–363F, 363I–364A). B
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[Bahasa Malaysia summary]

Pada 21 Disember 1998, responden (‘plaintif’) telah memfailkan satu saman terhadap perayu (‘defendan’) di Mahkamah Majistret, Temerloh. Pada 9 April 1999 apabila kes itu dipanggil, defendan mempertikaikan tuntutan plaintif dan telah diarahkan untuk memfail dan menyampaikan pernyataan pembelaan sebelum kes itu disebut semula pada 23 April 1999, dan beliau juga dinasihatkan oleh mahkamah untuk mendapatkan perkhidmatan seorang peguam. Pada 13 April 1999, defendan telah memperolehi guna khidmat Tetuan Bong & Co dan telah memfailkan notis kehadiran pada 15 April 1999. Pada 23 April 1999, oleh kerana pernyataan pembelaan telah tidak difail atau disampaikan, peguam bagi pihak plaintif telah membuat permohonan secara lisan untuk mendapatkan penghakiman ingkar. Majistret telah memberikan penghakiman seperti yang dipohon oleh plaintif dan telah tidak memberikan masa yang lebih kepada defendan. Pada 17 Mei 1999, defendan telah memfailkan satu permohonan untuk mengetepikan perintah yang dibuat pada 23 April 1999. Pada tarikh perbicaraan pada 30 Julai 1999, peguam plaintif membuat bantahan permulaan atas alasan prosedur yang betul yang patut digunakan oleh defendan ialah membuat rayuan ke Mahkamah Tinggi dan bukannya melalui permohonan untuk F

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A mengetepikan arahan. Majistret membenarkan bantahan permulaan, memutuskan yang beliau tidak mempunyai kuasa untuk mengetepikan arahnya yang terdahulu dan menolak permohonan dengan kos. Berbangkit dari itu, rayuan ini telah dibuat kepada hakim-dalam-kamar.

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Diputuskan, menolak rayuan dengan kos:

- C** (1) Berdasarkan kepada A 29 k 14 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), majistret yang arif adalah betul dari segi undang-undang dalam memutuskan yang beliau tidak mempunyai kuasa untuk mengetepikan penghakiman yang telah dibuatnya ekoran dari keenggaran berhubung dengan pembelaan, dan perayu sepatutnya membuat rayuan kepada Mahkamah Tinggi dan bukannya memohon mengetepikan penghakiman. Adalan tersirat melalui perkataan-perkataan permulaan pada A 29 k 14 KMR iaitu, berhubung dengan penghakiman atau arahan yang dibuat oleh sesuatu mahkamah rendah yang melibatkan perkara sivil, jika tidak terdapat peruntukan di dalam KMR untuk mengetepikan arahan atau penghakiman tersebut, seperti dalam kes ini, ini bererti tidak terdapat jalan untuk mengetepikan arahan atau penghakiman tersebut; prosedur yang wajar diikuti oleh pihak yang terkilan dalam situasi seperti itu adalah untuk membuat rayuan kepada Mahkamah Tinggi berhubung dengan keputusan tersebut (lihat ms 358I-359A, 362I-363A).
- E** (2) Majistret tidak mempunyai kuasa untuk mengetepikan di bawah A 2 k 2 KMR kerana defendan tidak mengatakan terdapat sebarang luar aturan berhubung dengan prosiding, dan permohonan adalah melibatkan merit semata-mata (lihat ms 360E). Begitu juga, majistret tidak mempunyai kuasa untuk mengetepi di bawah A 1 k 4(1) KMR dibaca bersama A 19 k 9 Kaedah-Kaedah Mahkamah Tinggi 1980 berdasarkan tidak terdapat lakuna di dalam KMR, berhubung dengan keputusan yang dibuat di bawah A 14 k 5(3) KMR, kerana masih terdapat ruang untuk mengetepikan keputusan dengan cara membuat rayuan kepada Mahkamah Tinggi di bawah A 49 k 6 KMR (lihat ms 360H-361H).
- G** (3) Tambahan pula, di bawah s 99A Akta Mahkamah Rendah 1948 dan s 19, Jadual Ketiga Akta tersebut, kuasa untuk melepaskan sebarang penghakiman hanya boleh dibuat 'setakat dan sebagai mana diperuntukkan oleh kaedah-kaedah mahkamah'. Oleh kerana KMR telah membuat preskripsi berhubung dengan keadaan-keadaan atau bila mana kuasa mahkamah untuk mengetepikan boleh digunakan dan berdasarkan implikasi A 29 k 14 KMR, ini bermakna yang kuasa untuk mengetepi hanya boleh digunakan oleh mahkamah dalam situasi-situasi atau keadaan-keadaan sebagai mana telah ditetapkan, dan
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tidak sebaliknya (lihat ms 362C–H). Pada masa yang sama, majistret tidak mempunyai kuasa untuk mengetepi di bawah A 53 k 11 KMR kerana di mahkamah majistret, defendan tidak mengatakan terdapat sebarang penyalahgunaan proses mahkamah oleh sebarang pihak dan persoalan ketidakadilan terhadap defendan tidak timbul kerana beliau mempunyai hak untuk membuat rayuan kepada Mahkamah Tinggi (lihat ms 362E–363F, 363I–364A).]

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Notes

For cases on setting aside a judgment or order, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2789–2800.

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Cases referred to

Retnam Pillai v Bahagia Trading Agency [1977] 1 MLJ 127 (refd)

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Legislation referred to

Subordinate Courts Act 1948 ss 19 of the Third Sch, 99A

Subordinate Courts Rules 1980 O 1 r 4(1), O 2 r 2, O 14 r 5(3), O 24 r 8, O 25 r 7, O 28 r 8, O 29 r 14, O 53 r 11, O 54 r 10

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Appeal from: Summons Case No 72–1494 of 1998 (Magistrate's Court, Temerloh)

AM Sebastian (Anthony M Sebastian & Co) for the appellant/defendant.

Francis Tan (Rosni, Francis Tan & Ho & Co) for the respondent/appellant.

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Mohd Hishamudin J: This is an interlocutory appeal to the judge-in-chambers against the decision of the learned magistrate, Temerloh, given on 30 July 1999. In his decision, the learned magistrate dismissed an application by the appellant/defendant to set aside the magistrate's court's order of 23 April 1999.

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The facts are as follows. On 21 December 1998, the respondent/plaintiff filed at the Magistrate's Court, Temerloh, a summons against the defendant alleging the non-repayment of a loan and claiming a sum of RM10,000. The summons was duly served on the defendant on 10 February. The defendant appeared in court on the return day of the summons ie 12 February 1999 but was informed by the court that the case had been postponed to 9 April 1999. On 9 April 1999, when the case was called, the defendant disputed the claim. He was ordered to file and serve his statement of defence before the next mention date. He was informed that the next mention date for the case was 23 April 1999. He was advised by the court to engage a counsel. On 13 April 1999 the defendant engaged a firm of solicitors, Tetuan Bong & Co, to represent him in the suit. On

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- A** 15 April 1999 the defendant filed in his notice of appearance notifying that he is disputing the plaintiff's claim. However, even until 23 April no statement of defence was filed or served. On 23 April, the counsel for the respondent/plaintiff orally applied for judgment in default of defence. The learned counsel for the appellant/defendant appealed to the learned magistrate for more time. The learned magistrate refused to grant more time and, instead, gave judgment as prayed for by the appellant/plaintiff. On 17 May 1999, the appellant/defendant (who by this time had changed his solicitor to Tetuan Anthony M Sebastian & Co) filed an application to set aside the order of 23 April. At the commencement of the hearing of the application on 30 July 1999, the learned counsel for the respondent/plaintiff made a preliminary objection. The objection taken was that the application to set aside was misconceived in that the correct procedure to be taken by the appellant/defendant was to have been by way of an appeal to the High Court and not by way of an application to set aside. The learned magistrate upheld the preliminary objection, holding that he had no power to set aside his previous order and he dismissed the application with costs.

The present appeal by the appellant/defendant is only on a point of law. The question of law for my determination is: Was the learned magistrate right in law in holding that he had no power to set aside the magistrate's order of 23 April?

- E** The learned counsel for the appellant/defendant, En AM Sebastian, submitted that the learned magistrate was wrong in law in upholding the preliminary objection. He was of the opinion that the learned magistrate had the power to set aside his previous judgment given in default of defence. He cited various authorities which I shall discuss in due course in this judgment.

- F** The learned counsel for the respondent/plaintiff, En Francis Tan, on the other hand, contended that the learned magistrate was right in law, citing *Retnam Pillai v Bahagia Trading Agency* [1977] 1 MLJ 127.

- G** In my judgment, the learned magistrate made the correct decision. I am of the view that the appellant/defendant was wrong in law in applying to the magistrate's court to set aside the order of 23 April. He should have appealed against the said order. To my mind, in the circumstances of the present case, the law does not provide for setting aside. I base my decision on O 29 r 14 of the Subordinate Courts Rules 1980 ('the SCR'). This provision reads:

- H** Setting aside or varying judgments and orders

- 14 *Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment. [Emphasis added.]*

- I** I think the opening words, 'Where in these rules provisions are made' are significant and it is my interpretation that the provision apart from

stipulating a 30-day time limit also implies that a party may apply to set aside (or vary) a judgment or order only in situations where provisions are made for the setting aside (or varying). In other words, if, in respect of a judgment or order made by a subordinate court in respect of a civil matter, there is no provision in the Subordinate Courts Rules for the setting aside (or the varying) of that order or judgment, as in the present case, then there is no recourse to setting aside (or varying) the same: the appropriate procedure to be followed by an aggrieved party in such a situation is to appeal to the High Court against that decision.

Instances where an application to set aside may be made are provided by O 2 r 2, O 24 r 8, O 25 r 7, O 28 r 8, and O 54 r 10 of the SCR.

However, the order of the learned magistrate was made under O 14 r 5(3) of the SCR which provides:

If a defendant fails to comply with the order of the court made under para (2), the court may make such order as it thinks just including, in particular, an order that judgment be entered for the plaintiff.

Paragraph (2) of r 5 stipulates:

Where a defendant appears in court and disputes the plaintiff's claim, the court may order him to serve a defence within such time as it may direct.

It is significant to observe that O 14 contains no provision as to the setting aside (or varying) of an order made under para (3). It is important to observe that, when the appellant/defendant filed the application before the magistrate to set aside the order of 23 April, he was not alleging any irregularity in the proceeding before the learned magistrate making the order. The application was solely on the merits: that the defendant was not negligent in not filing and serving the statement of defence; and that the defendant had a good defence against the plaintiff's claim. Had the application been based on irregularity then the learned magistrate would have had the power to hear the application by reason of O 2 r 2 of the SCR.

Retnam Pillai does not apply in the present case because the judgment in that case was based on the provisions of the former rules governing civil procedure in the subordinate courts namely the Subordinate Courts Rules 1950 (now repealed) where the provisions are different from the provisions in the SCR.

For the sake of completeness, I shall now deal with the arguments of the learned counsel for the appellant/defendant. En Sebastian's first argument is that the appellant/defendant could apply to set aside the order by reason of O 1 r 4 of the SCR. Rule 4 provides:

Where no procedure laid down

- (1) In any matter of procedure or practice not provided for in these rules, the procedure and practice for the time being in use or in force in the High Court shall, as near as may be, be followed and adopted.

A The learned counsel argued that since there is no provision for setting aside in the SCR in a respect of an order made under O 14, therefore, r 4 permits the adoption by the subordinate court of the procedure of the High Court in particular O 19 rr 2 and 9 of the Rules of the High Court 1980 ('the RHC'). Rule 2 provides:

B Default of defence: Claim for liquidated demand

- (1) Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

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And r 9 states:

Setting aside judgment

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The court may, on such terms as it think just, set aside or vary any judgment entered in pursuance of this order.

The learned counsel submitted that the learned author of *Janab's Key to Civil Procedure in Malaysia and Singapore*, (2nd Ed, 1995) fortified his contention. The relevant passage cited by learned counsel is found at p 677 of the book and is as follows:

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Setting aside judgment

There is no clear provision in the Subordinate Courts Rules 1980 for setting aside judgment in default of appearance or defence. However in the Rules of the High Court, 1980 there are clear provisions to set aside judgment in default of appearance and in default of defence pursuant to O 13 r 8 and O 19 r 19 respectively. In practice the subordinate courts appear to follow the practice and procedure followed by the High Court pursuant to O 1 r 4(1) of the Subordinate Courts Rules 1980.

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G With respect, in my opinion, merely because the SCR does not contain any provision for the setting aside by the magistrate's court of its judgment given in default of defence, it cannot be said that there is a lacuna in the SCR. To my mind, it is axiomatic that the absence of a corresponding provision in the SCR vis-a-vis the provision in the RHC cannot be a sufficient basis for determining whether or not there is a lacuna in the SCR. As I see it, there is no lacuna at all in the SCR. For, in respect of a decision made under O 14 r 5(3) of the SCR, there is still avenue to have the decision set aside: the aggrieved party can appeal to the High Court. Section 49 r 6 of the SCR provides:

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Appeal to judge in chambers

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- (1) Notwithstanding anything contained in this order, an appeal shall lie to a judge in chambers from any decision made by the court other than a decision made after trial.

The appeal must be considered an interlocutory appeal and must be made under r 6 above because the decision to give the judgment in default of defence clearly was not a decision made after a trial. To my mind, the learned author in the above passage of *Janab's Key to Civil Procedure in Malaysia and Singapore* 1995 second edn is not prescribing any principle pertaining to setting aside of judgments or orders in default of defence by the subordinate courts but is merely stating his observation as to what 'appears' to be the practice of the subordinate courts. With respect, I am not sure whether I can concur with the views of the learned author regarding the practice of the subordinate courts pertaining to setting asides and the application of O 1 r 4(1). However, assuming that such a practice indeed do exist and that it is based on O 1 r 4 of the SCR read with O 19 r 9 of the RHC then such a practice is based on a misconception of the law and must cease forthwith. If the practice is contrary to O 29 r 14 — and I hold that it is contrary to O 29 r 14 — then such a practice is wrong in law, no matter how widespread the practice is. Second, learned counsel referred to s 99A of the Subordinate Courts Act 1948 and s 19 of the Third Schedule of the Act. Section 99A states:

Further powers and jurisdiction of courts

In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every sessions court and magistrate's court shall have the further powers and jurisdiction set out in the Third Schedule.

Section 19 of the Third Schedule reads:

Discharge of orders

Power to discharge, vary or suspend the operation of any of its judgments or orders to the extent and in the manner provided by rules of court.

Now, it is true that the above s 19 of the Third Schedule gives the subordinate court the power to 'discharge' any of its judgments or orders. And according to Jowitt's *Dictionary of English Law* (p 620):

To discharge the order of a court or judge is to set it aside, on an application made for that purpose, either to the court in which the order was made, or to a court of appeal.

At the same time, however, it is significant to note that the power is restrictive in the sense that it may be exercised only 'to the extent and in the manner provided by rules of court'. The words 'rules of court' in s 19 mean any rules of court made under the Subordinate Courts Rules Act 1955. The SCR are such rules. As the SCR have prescribed the situations or circumstances in which the power to set aside may be exercised (eg O 2 r 2, O 24 r 8, O 25 r 7, O 28 r 8, and O 54 r 10), and in the light of the implication of O 29 r 14, as I have explained, it follows that the power to set aside may only be exercised by the court in the situations or circumstances so specified, and not otherwise.

Third, it was argued by En Sebastian that the magistrate has the power to set aside the judgment in default of defence by virtue of the court's

A inherent power as so declared by O 53 r 11 of the SCR. This provision reads:

Inherent powers

B For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

C While on the one hand, I concede that the court has wide inherent powers under this rule, including, in appropriate and deserving cases, the power to set aside its own judgments or orders, it is also my view that the court must tread with caution in invoking the powers under this provision, otherwise this provision itself might be abused. Since there are already provisions elsewhere in the SCR for the setting aside of judgments or orders, it should only be in rare and exceptional cases that the court sets aside a judgment or order in the exercise of its inherent powers. Even then, under this provision it must be appreciated that there is a limitation to the exercise of the inherent powers: the exercise of such powers is limited only to situations where it is 'necessary to prevent injustice or to prevent an abuse of the process of the court'. It is imperative for the court to bear in mind that the circumstances of the case must be such that it is clearly necessary for the court to exercise its inherent powers. The burden of satisfying the court on the necessity of exercising its inherent powers to prevent injustice or an abuse of the process of the court lies on the party seeking the court to invoke its powers. If we appreciate this limitation, then in the context of the present case, the irresistible conclusion is that O 53 r 11 is irrelevant. My reasons are these. First, before the learned magistrate the appellant/defendant was not alleging any abuse of the process of the court on the part of any party. Hence the question of abuse of process of court does not arise. Second, before the learned magistrate there was no question of preventing any injustice because the appellant/defendant had a right to appeal to the High Court against the previous decision of the magistrate.

G Finally, in support of his arguments, En Sebastian referred to the following cases:

- (1) *Hamzah Atan v Perbadanan Johor* [1995] 5 CLJ 183;
- (2) *Tan Lee Siang & Ors v Kenneison Brothers Sdn Bhd* [1999] 5 MLJ 716;
- (3) *Kewangan Bersatu Bhd v Yap Ah Yit & Ors* [1999] 1 CLJ 429; and
- H (4) *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79.

I With respect, I find none of the above cases cited relevant, for they can be distinguished from the present case. None of the above cases concern a judgment in default of defence made under O 14 r 5(3) of the SCR; and none of the cases discuss O 29 r 14 of the SCR.

In conclusion, I hold that by reason of O 29 r 14 of the SCR the learned magistrate was right in law in ruling that he did not have the

power to set aside his own judgment given in default of defence under O 14 r 5(3) of the SCR, and that the appellant should have appealed to the High Court instead of applying to the magistrate to set aside his judgment.

Appeal dismissed with costs.

Reported by Moy Saw Han

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